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92-1721

No. _____

Supreme Court, U.S.
FILED
MAY 21 1993
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

EDNA HARRIS,

Petitioner,

v.

AMERICAN MEDICAL INTERNATIONAL, INC.; WALTER WEISMAN; WALTER GEORGE; DAVID GORE; SHIRLEY HOFFMAN; PRESBYTERIAN/SAINT LUKE'S MEDICAL CENTER; JEANNE COAKLEY BEETHE,

Respondents.

BRIEF OF PRESBYTERIAN/SAINT LUKE'S MEDICAL CENTER IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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MEDICAL CENTER

May 21, 1993

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AMERICAN MEDICAL INTERNATIONAL, INC.; WALTER WEISMAN; WALTER GEORGE; DAVID GORE; SHIRLEY HOFFMAN; PRESBYTERIAN/SAINT LUKE'S MEDICAL CENTER; JEANNE COAKLEY BEETHE,

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STATEMENT OF THE CASE

The Petitioner, Edna Harris, is a black citizen of the United States who was employed by Presbyterian/Saint Luke's Medical Center ("P/SL") from July 13, 1981 to September 24, 1985. The assets of P/SL were sold to American Medical International, Inc. ("AMI") on September 24, 1985. Ms. Harris continued to be employed with AMI until June of 1988 when AMI terminated

Ms. Harris from her employment. Ms. Harris sought legal and equitable relief under 42 U.S.C. §§1981, 1985(3) and 1986, and the Thirteenth Amendment to the Constitution of the United States.

In the caption of the Amended Complaint, P/SL is identified as a Co-Defendant. However, Ms. Harris fails to mention P/SL by name in any allegation of the Amended Complaint. Ms. Harris alleges that

> "Between November 1, 1984 and July 1, 1988, the Defendants engaged in a conspiracy with each other and with unknown third persons for the purpose of depriving, either directly or indirectly, the Plaintiff, or a class of black persons, of equal protection of the laws, or of equal privileges and immunities under the law." (1a)

Although Ms. Harris directs certain allegations toward "the Defendants" Ms. Harris specifically confines her factual allegations to the alleged wrongs of "Defendants American Medical International, Inc., Walter Weisman, Walter George, David Gore and Shirley Hoffman."

P/SL filed its Motion to Dismiss the Amended Complaint (4a) on the grounds (among others) that the Amended Complaint did not contain any specific factual allegations of the existence of a

conspiracy with the specificity required to survive a motion to dismiss.

On September 19, 1990, the Honorable Zita L. Weinshienk, Judge, of the United States District Court for the District of Colorado, held a hearing on P/SL's Motion to Dismiss. Judge Weinshienk granted the Motion to Dismiss stating:

> "And one of the exceptions to notice pleading is when you allege a 1985 action. And the Tenth Circuit court, in Lessman v. McCormack has said very specifically .. and I believe there is some other cases .. I'm not familiar with the one that Mr. Smith is referring to .. it says that the complaint must allege facts showing a conspiracy; it's not enough that the conclusions are alleged." (8a)

On appeal, the United States Court of Appeals for the Tenth Circuit agreed with Judge Weinshienk stating in part:

> "We agree with the district court that plaintiff's conclusionary allegations of conspiracy lack the supporting factual detail necessary to sustain a claim for relief. See, e.g., Drake v. City of Fort Collins, 927 F.2d 1156, 1159, 1162-63 (10th Cir. 1991) (conclusory allegation of conspiracy in connection with adverse employment action insufficient to state a claim under §1985(3));

see also Durre v. Dempsey, 869 F.2d 543, 545 (10th Cir. 1989) (plaintiff must provide 'specific facts showing agreement with concerted action' to sustain civil rights conspiracy claim); Clulow v. Oklahoma, 700 F.2d 1291, 1296, 1303 (10th Cir. 1983) (conclusory allegation of conspiracy without supporting factual events insufficient to state claim)." (12a)

SUMMARY OF ARGUMENT

The United States Court of Appeals has not departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for exercise of this Court's power of supervision.

ARGUMENT

While this Court has the judicial discretion to grant a Petition for Writ of Certiorari when the United States Court of Appeals departs from the accepted and usual course of judicial proceedings, or sanctions such departure by a lower court, in this case Ms. Harris makes no showing that such departure from the accepted and usual course of judicial proceedings has occurred. To the contrary, the United States Court of Appeals in deciding this case followed its

earlier decisions. As an example, in Durre v. Dempsey, 869 F.2d 543, 545 (10th Cir. 1989), the Court held:

> "Plaintiff alleged defendants conspired to deprive plaintiff of his constitutional rights. Because plaintiff failed to allege specific facts showing agreement and concerted action among defendants, the district court properly dismissed the conspiracy claim with prejudice. See Sooner Prods. Co. v. McBride, 708 F.2d 510, 512 (10th Cir. 1983). Conclusionary allegations of conspiracy are insufficient to state a valid §1983 claim."

Similarly, in Drake v. The City of Fort Collins, 927 F.2d 1156, 1159, 1162-63 (10th Cir. 1991), the United States Court of Appeals dismissed the plaintiff's §1985(3) claim stating:

> "We have examined the complaint carefully and hold that the allegations of the complaint are not specific enough to provide any independent source to support a §1985(3) claim. See Clulow v. Oklahoma, 700 F.2d 1291, 1303 (10th Cir. 1983)."

Ms. Harris, cites as authority for her position Lessman v. McCormick, 591 F.2d 605, 611-12 (10th Cir. 1979) (Ms. Harris' Brief, Pages 7 and 8). In Lessman, the complaint alleged a conspiracy among all defendants to deny plaintiff equal protection of the

law and to injure her property and person. Judge Weinshienk relied upon Lessman when she dismissed the claim of Ms. Harris against P/SL. Lessman specifically held:

> "The complaint must allege facts showing a conspiracy against plaintiff 'because of' her membership and class and that the criteria defining a 'class were invidious'. Harrison v. Brooks, 519 F.2d 1358, 1360 (1st Cir. 1975)."

The language quoted from Lessman, supra, in the Brief of Ms. Harris relates to the question of whether the plaintiff should be allowed to attempt to develop through discovery specific facts which would support her conspiracy allegation. In Lessman, supra, however, the court had found the allegations of the complaint were sufficient to pass the specificity test. The court stated:

> "All that is alleged against the defendants other than White and Reynolds is that they conspired together and caused the arrest and detention. No specific facts are set out connecting them to the arrest. Even so we think there is sufficient here to pass the applicable liberal construction test. Specific facts are stated with respect to the officer forcing plaintiff to stay at police headquarters until the bank employee arrived."

It is clear that Lessman, supra, is consistent with the other authorities that are cited in this brief to the effect that Ms. Harris must allege with specificity the facts to support her allegation of a conspiracy.

Other circuits of the United States Court of Appeals have reached a similar conclusion. In Slotnick v. Stavisky, 560 F.2d 31 (1st Cir. 1977), the court stated:

> "In an effort to control frivolous conspiracy suits under §1983, federal courts have come to insist that the complaint state with specificity the facts that, in plaintiff's mind, show the existence and scope of the alleged conspiracy. It has long been the law in this and other circuits that complaints cannot survive a motion to dismiss if they contain conclusory allegations of conspiracy but do not support their claims with references to material facts. Dunn v. Gazola, 216 F.2d 709, 711 (1st Cir. 1954); Kadar Corp. v. Millbury, 549 F.2d 230 (1st Cir. 1977); Fletcher v. Hook, 446 F.2d 14 (3rd Cir. 1971); Johnson v. Stone, 268 F.2d 803 (7th Cir. 1959); Ellingburg v. King, 490 F.2d 1270 (8th Cir. 1974); Powell v. Jarvis, 460 F.2d 551 (2d Cir. 1972). This rule might have been applied with profit to this case. The complaint contains frequent references to conspiracy, but it offers few insights into the specific nature of the alleged concerted action."

See also, Robinson v. McCorkle, 462 F.2d 111 (3rd Cir. 1972), where the court stated:

> "With near unity the courts have rejected complaints containing mere conclusory allegations of deprivations of constitutional rights protected under §1985(3). 'A conspiracy claim based upon §1985(3) requires a clear showing of invidious, purposeful and intentional discrimination between the classes or individuals. Snowden v. Hughes, 321 U.S. 1, 64 S.Ct. 397, 88 L.Ed. 497 (1944); Hoffman v. Halden, 268 F.2d 280 (9th Cir. 1959); Colon v. Grieco, 226 F.Supp. 414 (D.N.J. 1964); Selico v. Jackson, 201 F.Supp. 475 (S.D. Cal. 1962).' Daly v. Pedersen, 278 F.Supp. 88 (D.Minn. 1967); Weise v. Reisner, 318 F.Supp. 580, 583 (E.D. Wis. 1970). Cf. Griffin v. Breckenridge, 403 U.S. 88, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1970)."

CONCLUSION

The question presented for review by Ms. Harris that the United States Court of Appeals has departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court is simply not the case. The United States Court of Appeals has followed its earlier decisions and the decisions of other

circuits that claims of conspiracy must be alleged with specificity for such claims to survive a motion to dismiss. Presbyterian/St. Luke's Medical Center respectfully requests this Court deny the Petition for Writ of Certiorari.

CLANAHAN, TANNER, DOWNING AND KNOWLTON, P.C.

By: Jack D. Henderson

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Attorneys for Respondent
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IN THE
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EDNA HARRIS,

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Respondents.

APPENDIX TO BRIEF OF PRESBYTERIAN/SAINT LUKE'S MEDICAL CENTER IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 90-Z-758

EDNA HARRIS,

Plaintiff,

v.

AMERICAN MEDICAL INTERNATIONAL, INC.; WALTER WEISMAN; WALTER GEORGE; DAVID GORE; SHIRLEY HOFFMAN; PRESBYTERIAN/SAINT LUKE'S MEDICAL CENTER; JEANNE COAKLEY BEETHE,

Defendants.

AMENDED COMPLAINT AND JURY DEMAND

COMES NOW the Plaintiff, Edna Harris, and files the following Amended Complaint against the above-named Defendants:

1. This is a suit for legal and equitable relief under 42 U.S.C. §§1981, 1985(3), and 1986, and the Thirteenth Amendment to the Constitution of the United States. Jurisdiction of the Court is invoked pursuant to 28 U.S.C. §§1331 and 1343.

2. Between November 1, 1984 and July 1, 1988, the Defendants engaged in a conspiracy with each other and with unknown third persons for the purpose of depriving, either directly or indirectly, the Plaintiff, or a class of Black persons, of equal protection of the laws, or of equal privileges and immunities under the laws. One or more persons engaged in the conspiracy did, or caused to be done, an act in furtherance of the object of such conspiracy, whereby the Plaintiff was injured in her person or property, or deprived of having and exercising a right or privilege of a citizen of the United States. Specifically, Defendants American Medical International, Inc., Walter Weisman, Walter George, David Gore and Shirley Hoffman terminated the Plaintiff from her employment as a licensed practical nurse on or about June 6, 1988 because of her race

(Black), as evidenced by racial comments, harassment, and retaliation; subjective termination criteria; and other facts and circumstances indicating that the Plaintiff was denied the equal protection of the laws.

3. Defendants American Medical International, Inc., Walter Weisman, Walter George, David Gore, and Shirley Hoffman, having knowledge that the wrongs conspired to be done were about to be committed, and having power to prevent or aid in preventing the commission of the same, neglected or refused to do so.

4. Defendants American Medical International, Inc., Walter Weisman, Walter George, David Gore, and Shirley Hoffman deprived the Plaintiff of the same right in the State of Colorado to make and enforce contracts, to sue, be a party, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and subjected the Plaintiff to punishment, pains, penalties, and exactions not imposed on white citizens. Specifically, these Defendants terminated the Plaintiff from her employment as a licensed practical nurse on or about June 6, 1988 in retaliation for the Plaintiff having filed a charge of racial discrimination against Presbyterian/Saint Luke's Medical Center with the Equal Employment Opportunity Commission and in retaliation for the Plaintiff having filed and pursued a civil rights action for racial discrimination and retaliation against Presbyterian/Saint Luke's Medical Center and T. Jeanne Coakley in the United States District Court for the District of Colorado.

5. At all times relevant to the claims alleged in paragraph 1-4, supra, the Defendants were acting intentionally and in reckless and callous indifference to the Plaintiff's federally protected rights.

WHEREFORE, the Plaintiff requests to be reinstated into the position of licensed practical nurse with all lost salary, back pay, front pay, and benefits; all actual and compensatory damages, including damages for pain and suffering, emotional and mental distress, and lost good name, reputation, honor, and integrity; punitive damages against each of the Defendants; expungement of all negative references to the Plaintiff contained in the records of American Medical International, Inc., Presbyterian/Saint Luke's Medical Center, and the Colorado Board of Nursing; interest and costs, including attorney's fees under 42 U.S.C. §1988; and such other and further relief as the Court and jury deem appropriate.

PLAINTIFF HEREBY DEMANDS A TRIAL BY JURY OF THE CLAIMS FOR RELIEF ALLEGED IN THE FOREGOING AMENDED COMPLAINT.

Respectfully submitted,

David L. Smith
Attorney for Plaintiff
1630 Welton Street, Suite 300
Denver, Colorado 80202
(303) 534-0153

Plaintiff's address:

3452 Josephine Street
Denver, Colorado 80205

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of May, 1990, a true and correct copy of the foregoing Amended Complaint and Jury Demand was hand delivered to the following:

Prentice Hall Corporation Systems, Inc.
1400 Glenarm Place, Third Floor
Denver, Colorado

Walter George
1834 Gilpin Street
Denver, Colorado

Shirley Hoffman
801 East 19th Avenue
Denver, Colorado

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 90-Z-758

EDNA HARRIS,

Plaintiff,

v.

AMERICAN MEDICAL INTERNATIONAL, INC.; WALTER WEISMAN; WALTER GEORGE; DAVID GORE; SHIRLEY HOFFMAN; PRESBYTERIAN/SAINT LUKE'S MEDICAL CENTER; JEANNE COAKLEY BEETHE,

Defendants.

MOTION TO DISMISS AMENDED COMPLAINT
AND JURY DEMAND

Defendant Presbyterian/Saint Luke's Medical Center ("PSL"), by and through its counsel, Kutak Rock & Campbell, respectfully moves this Court, pursuant to Rule 12(b)(6), Fed.R.Civ.P. to dismiss Plaintiff's Amended Complaint and Jury Demand in the above-captioned matter for failure to state a claim upon which relief can be granted.

1. Defendant PSL was served with a copy of Plaintiff's Amended Complaint and Jury Demand (the "Amended Complaint") on or about May 14, 1990. Plaintiff's Amended Complaint purports to request legal and equitable relief under 42 U.S.C. §§ 1981, 1985(3) and 1986, and the Thirteenth Amendment to the Constitution of the United States (Amended Complaint, ¶ 1).

2. Plaintiff alleges as the basis for each of these claims that between November 1, 1984, and July 1, 1988, Defendants American Medical International, Inc. ("AMI"), Walter Weisman, Walter George, David Gore and Shirley Hoffman engaged in a conspiracy with each other to terminate Plaintiff from her employment at AMI as a licensed practical nurse, effective June 6, 1988, because of her race (Amended Complaint, ¶¶ 2 through 5).

3. Plaintiff's Amended Complaint fails to allege facts sufficient to allow the Court to conclude that Plaintiff has a legal right to relief against PSL. Although Plaintiff makes a blanket allegation against all defendants in paragraph 2 of the Amended Complaint, not one specific factual allegation is directed against PSL. Since conclusory allegations are not sufficient to survive a motion to dismiss when no facts are alleged to support the conclusion, Bryan v. Stillwater Bd. of Realtors, 578 F.2d 1319, 1321 (10th Cir. 1977), the Amended Complaint fails to state a claim upon which relief can be granted and must be dismissed under Rule 12(b)(6), Fed.R.Civ.P.

4. Plaintiff's claim for relief under 42 U.S.C. § 1981 also fails to state a claim for relief and must be dismissed. Section 1981, which grants all persons the same right to make and enforce contracts as is enjoyed by white citizens, prohibits racial discrimination in the making and enforcement of private contracts. Where, as here, the alleged acts of discrimination do not involve the impairment of the specific rights to "make" or to "enforce" contracts, Section 1981 provides no relief. Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989). Because Plaintiff in this case alleges post-contract formation discriminatory conduct, Section 1981 is not applicable and that claim for relief must be dismissed.

5. Plaintiff's claim for relief under 42 U.S.C. § 1985(3) fails to state a claim for relief and must be dismissed. To state a claim under 42 U.S.C. § 1985(3), a complaint must allege the existence of five elements:

> 1) conspiracy; 2) motivated by "racial or perhaps otherwise class-based invidious discriminatory animus"; 3) "for the purpose of depriving either directly , or indirectly, any person or class of persons of equal protection of laws, or equal privileges and immunities under the laws"; 4) that the conspirator committed some act in furtherance of the conspiracy; and 5) that the plaintiff was either "injured in his person or property" or was "deprived of having and exercising any right or privilege of a citizen of United States."

Sager v. Woodland Park, 543 F. Supp. 282, 291 (D. Colo. 1982) (quoting Griffin v. Breckenridge, 403 U.S. 88, 102-03 (1971)). Because Plaintiff in this case fails to allege that PSL engaged in a conspiracy, and because PSL, as a matter of law, could not possibly have engaged in the alleged conspiracy, Section 1985(3) is not applicable and that claim for relief must be dismissed.

6. Plaintiff's claim for relief under 42 U.S.C. § 1986 fails to state a claim for relief and must be dismissed. It is axiomatic that a cause of action under Section 1986 is premised on the violation of Section 1985. Accordingly, where the Plaintiff cannot maintain a claim under Section 1985, a claim under Section 1986 must fail as well. Milton v. Wilson, 607 F. Supp. 510 (D. Colo. 1985). Because Plaintiff's claim under Section 1985 fails to state a claim upon which relief can be granted, Plaintiff's claim under Section 1986 must also be dismissed.

7. On September 29, 1988, PSL submitted, to the District Court, City and County of Denver, State of Colorado, its application for judicially supervised liquidation (the "Application"). On October 17, 1988, the District Court issued an order (the "Order") commencing the dissolution proceedings. The Order, among other things, fixed March 3, 1989 as the last day for the filing of claims against PSL and held that "creditors and claimants who fail to file a Proof of Claim on or before such date shall be barred from participating in the distribution of the assets of the Corporations." Plaintiff's claim, which has not been filed with the District Court, and which, in any event, was not filed prior to the bar date, must be dismissed as being untimely. C.R.S. § 7-8-120.

WHEREFORE, Defendant PSL respectfully requests that Plaintiff's Amended Complaint and Jury Demand be dismissed, with prejudice, and that the Court grant to PSL its reasonable costs, attorneys' fees and such other and further relief as the Court deems just and equitable, as set forth herein and as will be further detailed in the Brief in Support of its Motion to Dismiss, which PSL, by separate motion, has requested leave of this Court to file.

Respectfully submitted this 4th day of June, 1990.

KUTAK ROCK & CAMPBELL

By:_____
Elizabeth A. MacDonald
Tana K. Simard
2400 Arco Tower
707 Seventeenth Street
Denver, Colorado 80202
(303) 297-2400

Attorneys for Defendant
Presbyterian/Saint Luke's
Medical Center

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of June, 1990, service of the foregoing MOTION TO DISMISS AMENDED COMPLAINT AND JURY DEMAND was effected by placing true and correct copes thereof in the United States mail, postage prepaid, addressed to the following:

David L. Smith, Esq.
1630 Welton Street
Suite 300
Denver, CO 80202

Richard L. Thorgren, Esq.
Harding and Ogborn
1200 Seventeenth Street
Denver, CO 80202

_____

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 90-Z-758

EDNA HARRIS,

Plaintiff,

vs.

AMERICAN MEDICAL INTERNATIONAL, Inc., et al.,

Defendants.

REPORTER'S TRANSCRIPT
(Hearing on Motions to Dismiss: Bench Ruling)

Proceedings before the HONORABLE ZITA L. WEINSHIENK, Judge, United States District Court for the District of Colorado, commencing at 8:55 a.m., on the 19th day of September, 1990, in Courtroom C-502, United States Courthouse, Denver, Colorado.

APPEARANCES

DAVID L. SMITH, Attorney at Law, 1630 Welton Street, Suite 300, Denver, Colorado 80202, appearing for the plaintiff.

HARDING & OGBORN, by RICHARD L. THORGREN, Attorney at Law, 1200 17th Street, Denver, Colorado 80202, appearing for Defendants American Medical, Weisman, George, Gore, Hoffman and Beethe.

KUTAK ROCK & CAMPBELL, by TANA K. SIMARD, Attorney at Law, Suite 2400, 707 17th Street, Denver, Colorado 80202, appearing for Defendant Presbyterian/Saint Luke's.

(The arguments of counsel are not herein transcribed, pursuant to the direction of ordering counsel. The following proceedings were then had and entered of record:)

RULING

THE COURT: The motion to dismiss the 1981 action, allegations of discharge based on both retaliation and discrimination, will be denied This court's ruling is that the Tenth Circuit--I'm sorry--the Eighth Circuit, which is the sister circuit to the Tenth, really has the better reasoning on the question of Patterson. And if one indeed just reads Patterson, Patterson just simply does not cover the situation of a discriminatory discharge. It's an area that is not addressed.

So that motion will be denied. Except the Court will further find that there are no specific allegations concerning defendant Beethe; and the motion to dismiss Defendant Beethe will be granted, and that defendant will be stricken and dismissed from the complaint.

As to the 1982--as to the 1985 action, and 1986 also goes along with it, we have notice pleading, and there are only certain exceptions to notice pleading. And one of the exceptions to notice pleading is when you allege a 1985 action. And the Tenth Circuit court, in Lessman v. McCormick has said very specifically--and I believe there is some other cases--I'm not familiar with the one that Mr. Smith is referring to--it says that the complaint must allege facts showing a conspiracy; it is not enough that conclusions are alleged.

This has been the law in many other circuits; and I would cite for the record Slotnick v. Stavinsky, which is 560 F.2d 31, a First Circuit, 1977 case, wherein the court on page 33 indicated that complaints cannot survive a motion to dismiss if they contain conclusory allegations of conspiracy but do not support their claims with reference to material facts. That's in the context of a conspiracy action.

And in Robinson v. McCorkle, 462 F.2d 111, a Third Circuit case, the complaint must be dismissed when there are only broad conclusory allegations.

It has long been the law in this circuit and in others--and I intend to follow this law, and I have in the past followed it--that when you're pleading a 1985 complaint, you must allege facts, not conclusions. Facts have not been alleged. There hasn't been

anything in the complaint to say what the facts were concerning Presbyterian/Saint Luke's. In fact, they're not even mentioned by name in the complaint, nor is Defendant Beethe.

Accordingly, the Court will at this time grant the motion of Presbyterian/Saint Luke's to dismiss Presbyterian/Saint Luke's form the case. There is no 1981 claim against Presbyterian/ Saint Luke's, and the Court specifically finds that there are no facts alleged in the complaint to support a claim under section 1985.

I quite frankly believe also that--and I don't have to face the issue--that were we to look at the state bar, when Presbyterian/Saint Luke's was liquidated, that probably would be a good bar in this action against them. Certainly we do look to state law for many factors involved in a--in 1985 or in Federal claims; and where the entity was liquidated and another entity replaced them, I think that probably would bar the initial entity, although that issue will not be the basis for my determination because this is a motion to dismiss and not a motion for summary judgment.

Now, let me just say one more thing: I am going to allow AMI to file a motion for summary judgment if they want to concerning the 1985 claim. I would say to Mr. Smith that maybe you should look at the law carefully and decide whether you want to concede this issue, because as you're well aware, an attorney may not pursue a claim that does not have a basis in the law after investigation.

But in any case, let's have a--whatever you think appropriate, a motion for summary judgment as to the 1985 claim.

There also is very strong law, Mr. Smith, and I'm sure you're aware of it, that says that a corporation cannot conspire with employees. That's just clear law in the Tenth Circuit. Unless the employees have some individual interest, some personal gain that they might make, they cannot conspire with a corporation, with their employer corporation. And again, there is many, many cases in the Tenth Circuit on that point and in many other circuits. I think that's pretty much the law all over.

So if that's a basis for a motion to dismiss the conspiracy claim also, this is something that should be considered, because I think the law is clear in that regard. But we'll take that up when the time comes.

For the time being, the Court will deny American Medical International's motion to dismiss the 1981 claims based on both discriminatory and retaliatory discharge and will grant Presbyterian/Saint Luke's motion to dismiss Presbyterian/Saint Luke's from the case and will also dismiss all claims against Defendant Beethe, for failure to state any claims specifically against her.

We'll proceed, then, on the remaining claims at least at this point, till we review any further motions for summary judgment.

Thank you.

MR. THORGREN: Thank you, your Honor.

MS. SIMARD: Thank you, your Honor.

(Thereupon, the hearing was concluded and the Court recessed at 9:30 a.m.)

REPORTER'S CERTIFICATE

I certify that the foregoing is a correct transcript form the record of proceedings in the above-entitled matter.

Dated at Denver, Colorado, this 27th day of November, 1991.

_____

Paul A. Zuckerman

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

EDNA RUTH HARRIS, Plaintiff-Appellant, v. AMERICAN MEDICAL INTERNATIONAL, INC.; WALTER WEISMAN; WALTER GEORGE; DAVID GORE; SHIRLEY HOFFMAN; PRESBYTERIAN/SAINT LUKE'S MEDICAL CENTER; JEANNE COAKLEY BEETHE, Defendants-Appellees.	)	No. 91-1354 (D.C. No. 90-Z758) (D.Colo.)

ORDER AND JUDGMENT*

Before MOORE and TACHA, Circuit Judges, and SAFFELS**, Senior District Judge.

**Honorable Dale E. Saffels, Senior District Judge, United States District Court for the District of Kansas, sitting by designation.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3

Plaintiff Edna Harris was employed as a licensed practical nurse by defendant Presbyterian/Saint Luke's Medical Center (P/SL) on July 13, 1981. In late 1984, she was suspended for three days following an incident with a patient. As a result, plaintiff, who is black, filed a discrimination charge with the Equal Employment Opportunity Commission (EEOC). Shortly thereafter, P/SL filed two complaints against her with the Colorado Board of Nursing. Eventually, plaintiff filed a civil rights action under 42 U.S.C. § 1981 and the Thirteenth Amendment against P/SL and defendant Jeanne Coakley Beethe, alleging both discriminatory suspension and retaliation. See Aplt. App. Vol. X, tab 20 (Complaint in D.C. No. 85-K-1987). The district court granted summary judgment, and this court affirmed on appeal. See Harris v. Presbyterian/Saint Luke's Medical Ctr, No. 91-1125 (10th Cir. Nov. 6, 1991).

In the meantime, P/SL was acquired by defendant American Medical International (AMI), and plaintiff was terminated for threatening to retaliate against complaining patients. She then brought the present action under 42 U.S.C. § 1981, § 1985(3) and § 1986, alleging her termination was the result of a conspiracy motivated by racial discrimination and retaliation. The case was disposed of in three stages. On September 19, 1990, the district court dismissed all claims against P/SL and Ms. Beethe for lack of any allegations indicating their role in the conspiracy or the events complained of. Aplt. App. Vol. I at 167, 168-70 (bench ruling on motions to dismiss). On January 29, 1991, the district court granted summary judgment for the remaining defendants on plaintiff's claims under §§ 1985(3) and 1986, citing both (1) the absence of facts or factual allegations supporting the conclusory assertion of conspiracy, and (2) the intracorporate character of the alleged conspiracy. Id. at 172, 173-74 (bench ruling on motion for partial summary judgment). Finally, on September 9, 1991, the district court entered an order dismissing plaintiff's §1981 claim for discriminatory and retaliatory discharge in reliance on Patterson v. McLean Credit Union, 491 U.S. 164 (1989). Aplt. App. Vol. I at 159, 163. On appeal, plaintiff challenges all of these rulings as well as the denial of her motion under Fed. R. Civ. P. 11 seeking sanctions for untimely compliance with a discovery request. See id.

September 19, 1990, Order

Plaintiff's initial argument is procedural. She contends the district court erred in dismissing the claims against P/SL and Ms. Beethe "without [first] issuing a Rule 6(b) scheduling order limiting the time to complete discovery." Opening Br. at 7. Plaintiff does not

explain how the absence of an order limiting discovery would have any bearing on a motion to dismiss, much less does she cite pertinent authority in support of her position. Furthermore, P/SL notes the issue was not even raised in opposition to the motion to dismiss. Answer Br. of P/SL at 3. Indeed, the district court's docket reveals that plaintiff filed a motion for scheduling order under Rule 16(b)--which was promptly granted--only after the district court dismissed the claims against P/SL and Ms. Beethe. This issue is meritless. See generally Phillips v. Calhoun, 956 F.2d 949, 953-54 (10th Cir. 1992).

Next, plaintiff specifically challenges the district court's dismissal of her § 1985(3) conspiracy claim against P/SL and Ms. Beethe.[1] In essence, she argues that under the principle of notice pleading, recitation of statutory language coupled with a reference to adverse employment actions suffices to state a § 1985(3) claim--even against defendants not included in the operative allegations. See Opening Br. at 8-10; Aplt. App. Vol. I at 1, 2 (paragraphs 2 and 4 of the complaint). We agree with the district court that plaintiff's conclusory allegations of conspiracy lack the supporting factual detail necessary to sustain a claim for relief. See, e.g., Drake v. City of Fort Collins, 927 F.2d 1156, 1159, 1162-63 (10th Cir. 1991) (conclusory allegation of conspiracy in connection with adverse employment action insufficient to state a claim under § 1985(3)); see also Durre v. Dempsey, 869 F.2d 543, 545 (10th Cir. 1989) (plaintiff must provide "specific facts showing agreement and concerted action" to sustain civil rights conspiracy claim); Clulow v. Oklahoma, 700 F.2d 1291, 1296, 1303 (10th Cir. 1983) (conclusory allegation of conspiracy without supporting factual events insufficient to state claim).

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[1] Here and elsewhere plaintiff's conspiracy claims shall be referred to collectively. We note, however that unlike plaintiff's allegations of racially discriminatory discharge, which potentially implicate preexisting substantive rights under the Thirteenth Amendment, see Foster v. MCI Telecommunications Corp., 773 F.2d 1116, 1120 (10th Cir. 1985), the retaliatory discharge claim involves a right created by Title VII of the Civil Rights Act, which cannot be redressed under § 1985(3), see Great Am. Fed. Sav. & Loan Ass'n v. Novotny, 442 U.S. 336, 372, 376-78 (1979); Long v. Laramie County Community College Dist.., 840 F.2d 743, 752 (10th Cir.) cert. denied, 488 U.S. 825 (1988).

As a last resort, plaintiff maintains that she was entitled, in any event, to amend her (already amended) complaint to cure the noted pleading deficiency and, therefore, the district court erred in dismissing the conspiracy claims with prejudice. However, plaintiff does not assert, nor does the record show, that she actually submitted or sought leave to submit such a curative amendment. Accordingly, the district court's final disposition of the matter was proper under the circumstances. See Glenn v. First Nat'l Bank, 868 F.2d 368, 369-71 (10th Cir. 1989).

January 30, 1991, Order

Plaintiff raises a number of procedural and substantive objections to the district court's ruling on the intracorporate nature of the alleged conspiracy among the remaining defendants. See Opening Br. at 10-18. As already noted, however, that ruling was just one of two alternative rationales given for dismissing these conspiracy claims. Before the district court turned to the "even more important reason" for dismissal provided by the intracorporate conspiracy principle, which is an unsettled matter in this circuit, see, e.g., Wilhelm v. Continental Title Co., 720 F.2d 1173, 1175 (10th Cir. 1983), cert. denied, 465 U.S. 1103 (1984), the district court emphasized the conclusory character of the conspiracy allegations generally, and concluded that plaintiff had failed to establish any conspiracy (of whatever nature) with the requisite specificity. Aplt. App. Vol. I at 173. Because we agree with this assessment, we leave the intracorporate conspiracy question for another day and discuss only those matters pertinent to the former, more fundamental and less controversial, rationale for disposition of the case.

As we have already recognized, plaintiff's allegations of conspiracy fall far short of the level of specificity required to state a claim under § 1985(3). Her evidentiary showing in response to the summary judgment motion did not correct the deficiency. Plaintiff objects that the district court did not properly consider the depositions and related exhibits she submitted in opposition to the motion, but plaintiff did not even attempt to identify any particular testimony or evidentiary item in support of her case. The district court explained to counsel:

> I would be happy to have something pointed to me in the depositions. When depositions are used in motions for summary judgment, . . . the deposition is not thrown at the

> judge. The pages and lines are given so that we can see what is referred to. That's the only way that depositions can be used in this type of motion.

Aplt. App. at 175. Plaintiff now supplies us with the record she claims the district court disregarded, but again provides no particularized citations to support her conspiracy claims.[2] Like the district court, we do not sift through materials submitted in bulk to determine whether there exists some dormant evidence supporting a party's assertion. See Thomas v. Wichita Coca-Cola Bottling Co., 968 F.2d 1022, 1024-25 (10th Cir. 1992), petition for cert. filed, 61 U.S.L.W. 3303 (U.S. Sept. 29, 1992 (No. 92-581); S.E.C. v. Thomas, 965 F.2d 825, 827 (10th Cir. 1992).

Plaintiff also contends that the district court erred by granting summary judgment over her objection, pursuant to Fed. R. Civ. P. 56(f), that she had not yet completed discovery. We review the decision whether to grant additional time for discovery, under a deferential, abuse of discretion standard. Patty Precision v. Brown & Sharpe Mfg. Co., 742 F.2d 1260, 1264 (10th Cir. 1984). Plaintiff asserts that much of the evidence necessary to establish her claims was in defendants' possession, and emphasizes that discovery was not yet completed when the district court granted summary judgment.[3] Neither of these points is sufficient to mandate continuance of the summary judgment proceedings. See Guthrie v. Sawyer, 970 F.2d 733, 738 (10th Cir. 1992); Jones v. City & County of Denver,

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[2] The only citation to a relatively specific item submitted in opposition to summary judgment refers to an interrogatory response from AMI addressing only the legal relationship between P/SL and AMI. See Opening Br. at 15-16 (citing Aplt. App. Vol. I at 152-54). We note that plaintiff also cites to a set of answers she gave to questions posed by the magistrate judge. Id. (citing Aplt. App. Vol. I at 113-133). However, in addition to involving simply another indiscriminate reference to some eighteen pages of testimony, this material was prepared after summary judgment had been granted on the § 1985(3) claims.

[3] However, the pertinent formal cut-off date, i.e., for nonexpert, factual discovery, was only one month away at the time. See Opening Br. at 12 (citing discovery scheduling order).

854 F.2d 1206, 1211 (10th Cir. 1988). We consider it significant that when plaintiff commenced this case, she already possessed the depositions of some of the defendants, which had been taken in her first employment discrimination action against P/SL, and that another fourteen months passed before summary judgment was granted here. Cf. Culver v. Town of Torrington, 930 F.2d 1456, 1459 (10th Cir. 1991) (four-month period following motion provided sufficient time for discovery for purposes of Rule 56(f). Under the circumstances, we do not think the district court abused its discretion by resolving the conspiracy claims on summary judgment, particularly in light of plaintiff's failure properly to utilize the substantial existing record to present to the district court specific facts in support of her conspiracy allegations. See Contemporary Mission, Inc., v. United States Postal Serv., 648 F.2d 97, 107 (2d Cir. 1981) (when plaintiff fails to produce specific facts to support conspiracy allegations, district court may, in its discretion, refuse to permit discovery and grant summary judgment).

September 9, 1991, Order

Following the issuance of recent decisions by this court regarding the effect of Patterson v. McLean Credit Union, 491 U.S. 164, on the limited availability of § 1981 in the employment discrimination context, the district court ordered briefing on whether plaintiff's § 1981 claims for discriminatory and retaliatory discharge remained actionable. We agree with its subsequent conclusion that, under Patterson and this court's post-Patterson decisions, they are not.

Plaintiff's claim for discriminatory discharge is precluded by Trujillo v. Grand Junction Regional Center, 928 F.2d 973, 975-76 (10th Cir. 1991). As for the retaliatory discharge claim, we note that "[t]he right to enforce contracts does not . . . extend beyond conduct by an employer which impairs an employee's ability to enforce through legal process his or her established contract rights." Carter v. Sedgwick County, 929 P.2d 1501, 1504 (10th Cir. 1991) (quoting Patterson, 491 U.S. at 177-78) (emphasis added). The "enforcement" action by plaintiff allegedly prompting her discharge was the filing of an EEOC charge and subsequent lawsuit for (1) discriminatory suspension and (2) general racial harassment, see Aplt. App. Vol. X, tabs 19, 20, neither of which involves contract rights implicating § 1981 protections. See, e.g., Hill v. Goodyear Tire Rubber, Inc., 918 F.2d 877, 880 (10th Cir. 1990) (claim for racial

harassment not actionable under 1981); Mozee v. American Commercial Marine Serv. Co., 940 F.2d 1036, 1052 (7th Cir. 1991) (after Patterson, claims for wrongful suspension do not give rise to § 1981 liability). Consequently, retaliation for such action likewise does not fall within the ambit of § 1981. Hill, 918 F.2d at 880; Riel v. Reed, 760 F. Supp. 852, 854 (D. Colo. 1991); accord Sherman v. Burke Contracting, Inc., 891 F.2d 1527, 1535 (11th Cir.), cert. denied, 111 S. Ct. 353 (1990).

Plaintiff seeks to circumvent the cited authorities on the retaliation claim by the following three-step argument: (1) the discrimination she suffered was contrary to policies and procedures of her employer, (2) under state law, such policies and procedures may be accorded the status of contract rights, and (3) therefore, her EEOC charge and suit constituted, in effect, the use of legal process to enforce the kind of specific contract rights still recognized as protected under § 1981. Opening Br. at 23. We express no opinion on the merits of this line of argument, as it was not asserted before the district court. See Neu v. Grant, 548 P.2d 281, 287 (10th Cir. 1977).

Plaintiff has, however, raised an even more radical argument to disassociate her § 1981 retaliation claim from the adverse precedents discussed above. Noting that those cases delimit only the right to make and enforce contracts and do not deal with the other protected interests established by the statute, particularly the right to sue, be parties, and give evidence, and the entitlement to full and equal benefit of the laws, see Phelps v. Wichita Eagle-Beacon, 886 F.2d 1262, 1267 (10th Cir. 1989), plaintiff contends she has a cause of action to redress the burden (retaliatory termination) allegedly placed on her use of legal process, which existing case law does not undercut. However, plaintiff is not able to cite any case law directly in her favor either. For the reasons that follow, we need not decide whether such a claim exists in the present context, for plaintiff's pleadings would be deficient in any event.

The problem with plaintiff's claim here is that it ignores the single, most fundamental concern of § 1981. Whatever else the statute may or may not require, there can be no actionable violation unless the conduct complained of was motivated by intentional racial, or similar class-based, discrimination. See General Bldg. Contractors Ass'n, Inc. v. Pennsylvania, 458 U.S. 375, 382-91 (1982). Thus, for example, where the Supreme Court recognized a cause of action against unions for interfering with minority members, right to pursue grievances with their employer, the Court noted that

the unions had "categorized racial grievances as unworthy of pursuit and, while pursuing thousands of other legitimate grievances, ignored racial discrimination claims on behalf of blacks, knowing that the employer was discriminating in violation of the contract." Goodman v. Lukens Steel Co., 482 U.S. 656, 669 (1987). In short, the unions not only hampered pursuit of legal process against management, they specifically and deliberately did so only with respect to minority grievances. Here, in contrast, while plaintiff claims she was terminated in retaliation for pursuing legal process against her employer, she did not allege that defendants' motive in this connection was specifically racial, i.e., that it went beyond retaliation per se. As it happens, the underlying grievances were for discrimination, but "[i]t is not true that 'a retaliatory response by an employer against [an employee] who genuinely believed in the merits of his or her [discrimination] complaint would inherently be in the nature of a racial situation. . . . An employer could have a policy of firing any employee who made legal trouble for it on any ground.'" Malhotra v. Cotter & Co., 885 F.2d 1305, 1313 (7th Cir. 1989) (citation omitted). The racial nature of an underlying grievance might well provide circumstantial evidence that a subsequent retaliatory response was also racially motivated. Nevertheless, the latter allegation must first expressly and clearly be made before any claim under § 1981 is even stated. In our judgment, that was not done here.

Lest our insistence on the distinctive, definitive element of a § 1981 claim appear unduly harsh, we emphasize that there already exists a remedy for the kind of retaliation that has been alleged here. Termination in response for filing discrimination charges is specifically proscribed by § 704(a) of Title VII, 42 U.S.C. §§ 2000e-3(a). Consequently, there is good reason not to adopt a tortuous or idiosyncratic construction of § 1981 simply to provide some remedy for the retaliatory conduct defendants allegedly engaged in. See Trujillo, 928 F.2d at 976; Overby v. Chevron USA, Inc., 884 F.2d 470, 473 (9th Cir. 1989).

Finally, plaintiff challenges the district court's refusal to impose sanctions under Rule 11 in connection with the belated production of a document requested in discovery. We review this decision only for an abuse of discretion. Coffey v. Healthtrust, Inc., 955 F.2d 1388, 1393 (10th Cir. 1992). The district court's order provides a full and fair analysis of counsel's reasonable conduct in this matter. Aplt. App. at 159-62. Furthermore, while the document in question refers to both completed and contemplated disciplinary action against plaintiff, noting her history of employment dissatisfaction, insubordination, and allegedly abusive behavior with pa-

tients, it

does not reflect or suggest a racially motivated conspiracy, which of course is the cornerstone of the § 1985(3) claim plaintiff sought to have reinstated. It was not an abuse of discretion to deny the requested sanction.

The judgment of the United States District Court for the District of Colorado is AFFIRMED.

Entered for the Court

John P. Moore
Circuit Judge